(1)

Supreme Court, U.S.
FILED

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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

ROBERT A. HUNGERSCHAFER --PETITIONER

v.

BRAD GATES, ET AL. --RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ROBERT A. HUNGERSCHAFER

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25 pp

QUESTION(S) PRESENTED

1) DOES A SUBSIQUENT JUDICIAL FINDING OF FACTUAL INNOCENCE IN A CRIMINAL MATTER BRING THE INITIAL CHARGES AND COMPLAINT INTO QUESTION TO SUCH AN EXTENT AS TO WARRENT A HEARING ON THE MATTER TO ALLOW A DEFENDANT THE OPPERTUNITY TO ESTABLISH HIS OR HER INNOCENSE ON OTHER RELATED CHARGES?
2) MUST A PLEA BARGAIN AGREEMENT IN A CRIMINAL MATTER MEET THE SAME CRITERIA AS A CIVIL CONTRACT?

LIST OF PARTIES

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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TABLE OF AUTHORITIES CITED

Cases

Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 [51 S.Ct. 153, 75 L.Ed. 374] 5
Johnson v. Louisiana, 406 U.S. 356, 360, 92 S.Ct. 1620, 1623, 32 L.Ed.2d 152 4
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Statutes

California Penal Code 135 1
California Penal Code 148.9(a) 1
California Penal Code 851.8 3
California Vehicle Code 23152(a) 1
California Vehicle Code 23152(b) 1
FED. R. CRIM. P. 11(e)(4) 6

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix A to the petition and is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided my case was July 15, 1996. No petition for rehearing was timely filed in my case. Petitioner filed this petition for certiorari on October 15, 1996 and was returned to the petitioner on October 24, 1996 pursuant to Supreme Court Rules 14.5.
The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). In the alternative the jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment VI; Federal Rules of Criminal Procedure 11(e)(4); California Penal Code 851.8 California Vehicle Code 23152(a).

STATEMENT OF THE CASE

On or about 3/24/91 petitioner was arrested and charged with violations of California Vehicle Code 23152(a), driving under the influence; and California Vehicle Code 23152(b), driving over .08; California Penal Code 135, Destruction of evidence; and California Penal Code 148.9(a), False representation. Police blood test results showed a blood alcohol level of .09.

Petitioner contracted attorney Fred Anderson to represent him on the above mateıs. On 5/1/91 petitioner met and retained Henry Greenberg, as an expert blood analyst. On 5/3/91 Henry Greenberg prepared an expert testimony declaration in this matter and mailed it to Fred Anderson. In that declaration Henry Greenberg expressed his expert opinion that the petitioner's blood alcohol level at the time of driving would have been .04 to .06.

On 6/5/91 petitioner contacted Fred Anderson to request a private analysis of the police blood sample. Fred Anderson, deficiently, would not have a private analysis performed, but at petitioner's insistence instructed petitioner how to obtain a private analysis. Petitioner then contracted Henry Greenberg to perform a private blood analysis of the police sample. Henry Greenberg then mailed the results of his analysis to Fred Anderson on 6/10/91. Those results showed a blood alcohol level of .08 a full point below the police sample and on the legal limit.

On 6/19/91 petitioner, with the guidance of Fred Anderson, entered into a plea bargain agreement and plead guilty to count 1, driving under the influence, and the remaining counts were dismissed and on 9/23/94 petitioner was found factually innocent of those same dismissed charges. On 6/19/91 petitioner questioned Fred Anderson regarding the Greenberg reports, but Fred Anderson was unable to locate the documents and further advised petitioner that if there was anything of substance in the reports he would have remembered it. After attorney Fred Anderson had left the court room and petitioner was without counsel the trial court directed the court clerk to modify the plea bargain agreement to the petitioner's prejudice.

On 8/22/91 petitioner was surprised discover the results of the Greenberg reports.

Fred Anderson rendered ineffective assistance of counsel, since he did not advise petitioner of the contents of the Greenberg reports and all affirmative defenses prior to the plea bargain agreement. Petitioner would not have entered into the plea bargain agreement had all of the facts been presented to him, and it is highly unlikely this matter would have resulted in conviction had petitioner entered a plea of not.

Petitioner spent the next three years pursuing remedies in the state court system, starting with retaining attorney Elliott Gayer, who's active misrepresentations caused petitioner to loose his state appeal rights and resulted in Elliott Gayer resigning from the state bar with charges pending on 3/2/93, and then on 3/3/95 the issuance of a non-dischargeable Federal Bankruptcy Adversary Judgment issued in favor of petitioner against Elliott Gayer for fraud.

Petitioner filed a Petition for Writ of Error Coram Nobis, and then went through the State Court system twice pursuing a Writ of Habeas Corpus, the second time with a Federalized version of his first. Discovering he could request it, on 8/16/93 petitioner filed a Motion for Order Extending Time for Appeal, which was denied on 8/25/93. All petitioner's cases were dismissed on the Merits, exhausting all petitioner's State remedies.

Petitioner then entered the Federal System pursuing a Writ of Habeas Corpus on 1/26/94 which was dismissed by the district court on 11/2/95.

Petitioner served a Petition pursuant to California Penal Code 851.8 to be declared factually innocent of Counts 2 - 4 listed above, on the Orange County District Attorneys office on July 12, 1994 and September 7, 1994 then in a hearing held on September 23, 1994 held before the original trial judge, petitioner was found factually innocent of all other charges in this matter, counts 2 - 4. California Penal Code 851.8 only permits review of charges which did not result in conviction, accordingly count 1 was un-reviewable.

Petitioner filed a Motion to Augment Record to the United States District Court on June 16, 1995, to have included the finding of factual innocence dated September 23, 1994. The motion was denied on October 17, 1995.

Petitioner filed a timely notice of appeal to the United States Court of Appeal for the ninth circuit on 11/9/95 which was dismissed on 7/15/96.

As a result of his wrongful conviction on 6/19/91 for a single charge for which the State has a very weak case, if any case at all, and which the state would not have been able to prosecute had all of the facts been disclosed prior to trial, petitioner still faces collateral consequences and this matter is not moot.

REASONS FOR GRANTING THE PETITION

First, on 6/23/94 the District Court originally dismissed this case. Later on 9/23/94 the trial court made a determination that no reasonable cause exists to believe that the arrestee committed the offense for which the arrest was made as it related to all other charges in this matter and the petitioner was found factually innocent of all the remaining counts in this matter. Thus demonstrating the State had a very weak case, if any case at all, which collapses under scrutiny, and it is highly likely petitioner's affirmative defense would have succeeded at trial, especially since a finding of factual innocence passes a higher standard that a finding of not guilty. This passes the requirements of the prejudice prong of the Strickland v. Washington test, as described in the Report and Recommendations of the United States Magistrate Judge. This also suggests that a defense based on the Greenberg results would have left the petitioner much better off than the plea bargain agreement, contrary to the Report and Recommendations of the United States Magistrate Judge. On June 12, 1995 this case was remanded back to the District Court and on August 2, 1995 petitioner filed a motion to amend and augment the record to include the finding of factual innocence which was material and relevant to a consideration on the record, had direct bearing on the case, and was required to ensure an adequate record before the Court to properly present the grounds to be raised. The motion was denied on October 17, 1995. The finding of factual innocence certainly raises a reasonable doubt such as to cause prudent men to hesitate before acting in matters of importance to themselves. U.S. v. Johnson, C.A.N.Y., 343 F.2d 5,6; U.S. v. Chas. Pfizer & Co., Inc., D.C.N.Y., 367 F.Supp. 91, 101. This is especially true when the doubt arises from evidence or lack of evidence. Johnson v. Louisiana, 406 U.S. 356, 360, 92 S.Ct. 1620, 1624, 32 L.Ed.2d 152. The case should be decided on it's own facts and circumstances and on the total atmosphere of the case, People v. Newell, 272 C.A.2d 638. Thus, in light of the atmosphere of this case it is reasonable to assume petitioner would have prevailed at trial, passing the prejudice prong of the Strickland v. Washington test. The state of facts would lead a man of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that the petitioner is innocent of the crime. See

People v. Ingle, 53 Cal.2d 407, 412 and Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 [51 S.Ct. 153, 75 L.Ed. 374].

Since a factual finding has been made that no reasonable cause exists to believe that the arrestee committed the offense for which the arrest was made as it related to all other charges in this matter, a presumptive finding can be made for the one outstanding charge in this matter that the petitioner if factually innocent of that charge also. At a full evidentiary hearing the petitioner was able to prove his factual innocence to all other charges because the statute provided that those charges could be judged for their truthfulness. If we cannot believe any of the information as it relates to the dismissed charges then what can we believe about the sole remaining charge. Unfortunately, the statute as it exists does not provide the mechanism to make this determination. Petitioner suggests that such overwhelming evidence of his innocence on the other related charges should permit an evaluation, based on the evidence, of the remaining charge, either in the form of a full evidentiary hearing or by remanding the case back to the original court to have the charge heard. The finding of factual innocence is material and worth a consideration.

Secondly, on the issue of sentencing, petitioner argues that the plea bargain agreement be declared Null and Void since it is now obvious petitioner received nothing of value in exchange for his guilty plea, since he was found factually innocent of counts all the remaining counts and there was no mutual consideration. A plea bargain agreement is usually treated as a contract and can be breached; U.S. v. Robinson, 924 F.2d 612, 613-14 (6th Cir. 1991); U.S. v. Sophie, 900 F.2d 1064, 1071 (7th Cir.); U.S. v. Partida-Parra, 859 F.2d 629, 634 (9th Cir. 1988); U.S. v. Coleman, 895 F.2d 501, 505 (8th Cir. 1990).

An Appellant who alleges that the government breached a plea bargain agreement is entitled to an evidentiary hearing or, in any courts discretion, discovery or expansion of the record; Watts v. U.S., 841 F.2d 275, 277-78 (9th Cir. 1988).

If any breach by the government is demonstrated, the court has discretion to cure it by allowing withdrawal of the plea; U.S. v. Mandell, 905 F.2d 970, 973 (6th Cir. 1990); U.S. v. Norgaard, 959 F.2d 136, 138 (9th Cir. 1992).

If the court rejects such an agreement, it must advise the defendant that he may then withdraw the plea, and that if the plea is not withdrawn, a less favorable sentence than that contemplated in the plea agreement may be imposed; FED. R. CRIM. P. 11(e)(4); U.S. v. Fernandez, 960 F.2d 771, 772-73 (9th Cir 1991).

Additionally, in a Quid Pro Quo agreement both sides must deal in good faith and be dealing with items of some value. Respondent's District Court Answer Brief clearly shows the State was offering a Quid Pro Quo agreement: to dismiss counts 2 - 4 in exchange for a guilty plea to count 1. See paragraph 2, (pg. 2), "in return for..."; paragraph 3, (pg. 5), "in return for..."; paragraph 3, (pg. 7), "agreed to dismiss..."; paragraph 3, (pg. 9), "agreed to dismiss..."; footnote 9, paragraph 2, (pg. 11), "willing to bargain away counts...". Since it is now quite obvious that petitioner received nothing of value in exchange for his guilty plea, since he was found factually innocent of all the remaining counts, the State really gave nothing of value as required with mutual consideration and the agreement should be declared null and void as would a civil contract.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Robert A. Hungerschafer

Date: December 16, 1996

APPENDIX A

Robert A. Hungerschafer,

Plaintiff-Appellant,

v.

Brad Gates, et al.,

Respondents-Appellees.

No. 95-56761.

United States Court of Appeals,

Ninth Circuit.

Memorandum*

Appeal from the United States District Court
for the Central District of California
A. Wallace Tashima, District Judge, Presiding

Submitted July 9, 1996.**

Decided July 15, 1996.

Before SCHROEDER and POOLE, Circuit Judges;

HUG, Chief Judge.

Robert Anthony Hungerschafer appeals pro se the district court's denial of his 28 U.S.C. § 2254 habeas petition challenging his guilty plea conviction for driving while under the influence of alcohol. Hungerschafer contends that the district court erred by

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The Panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

failing to hold an evidentiary hearing and permit discovery on his claims that his attorney was ineffective during his guilty plea to driving under the influence of alcohol and at sentencing. We have jurisdiction pursuant to 28 U.S.C. § 2253. We review de novo the district court's denial of a petition for writ of habeas corpus, Caleron v. Prunty, 59 F.3d 1005, 1008 (9th Cir. 1995), and we affirm.

Hungerschafer contends that his attorney failed to advise him before he pleaded guilty of the blood test results obtained by an expert that Hungerschafer hired. He alleges that he would not have pleaded guilty had he known of the results.

To succeed on a claim that a guilty plea is involuntary based upon ineffective assistance of counsel, the defendant must show that there is "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59 (1985); see also Shah v. United States, 878 F.2d 1156, 1158 (9th Cir.), cert. Denied, 493 U.S. 869 (1989). "[W]here the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error 'prejudiced' the defendant . . . will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea." Hill, 474 U.S. at 59. This assessment depends in large part on whether the evidence likely would have changed the outcome at trial. Id.

Here, Hungerschafer was charged with driving under the influence of alcohol, driving with a blood-alcohol level greater than .08%, destroying evidence, and giving false information to a police officer. All but the first charge were dismissed in exchange for his guilty plea. In California, a person may be convicted of driving while under the influence of alcohol without proof of any particular level of alcohol in the blood. See Cal. Veh. Code § 23152(a) (West 1985 & Supp. 1995); Burg v. Mun. Court, 673 P.2d 732, 735-37 (Cal. 1983), appeal dismissed and cert. denied, 466 U.S. 967 (1984). Hungerschafer does not allege that the test results were the only proof that he was under the influence of alcohol at the time he was arrested. Thus, although the expert's blood test results were relevant to the charge of driving with a high blood-alcohol level, Hungerschafer has not shown that the expert's test results and testimony would have affected the outcome of a trial on the charge to

which he pleaded guilty. Moreover, had Hungerschafer proceeded to trial, he also faced charges of lying to a police officer and destroying evidence. The test results would have had no impact on his prospects for prevailing on these charges at trial. Accordingly, because Hungerschafer failed to show that the test results would have led counsel to change his recommendation as to the plea, no prejudice resulted from counsel's actions. See Hill, 474 U.S. at 59.[1/]

Because Hungerschafer has served his sentence and satisfied all conditions of his probation, we agree with the district court that Hungerschafer's various claims attacking his sentence are moot. See Lane v. Williams, 455 U.S. 624, 631-33 (1982); Aaron v. Pepperas, 790 F.2d 1360, 1361-62 (9th Cir. 1986). Hungerschafer failed to allege facts entitling him to relief; therefor the district court did not abuse its discretion by failing to hold an evidentiary hearing. See Greyson v. Kellam, 937 F.2d 1409, 1412 (9th Cir. 1991). Finally, because Hungerschafer did not specify what he hoped to obtain through discovery, the district court acted within its discretion by denying Hungerschafer's discovery request. See Campbell v. Blodgett, 982 F.2d 1356, 1358 (9th Cir. 1993).

AFFIRMED.

1/ We also find no error in the district court's denial of Hungerschafer's motion to amend and augment the state record. Hungerschafer sought to introduce documents showing that the state court has since declared him factually innocent of the charges dismissed pursuant to his guilty plea. The fact that Hungerschafer obtained a proforma dismissal of these charges several years after his guilty plea conviction has no relevance here.

APPENDIX B

Robert A. Hungerschafer,

Plaintiff,

v.

Brad Gates, et al.,

Respondents.

No. CV94-887-AWT(JR).

United States District Court,

Central District of California.

Judgment

IT IS ADJUDGED that the petition and the action are dismissed, on the merits.

DATED: OCT 31, 1995

/s/A. Wallace Tashima

APPENDIX C

United States District Court,

Central District of California.

Civil Minutes - General

Case No. CV94-887-AWT(JR).

Date: October 7, 1995

Title: Hungerschafer v. Brad Gates

Docket Entry

Present:

Hon. Joseph Reichmann, U.S. Magistrate Judge

Cindy De La Torre, Deputy Clerk

Attorneys not present.

Proceedings: In chambers

IT IS ORDERED AS FOLLOWS:

1. Brad Gates, Sheriff of Orange County, California is named as Respondent.

2. Petitioner's motion to amend and augment the record is DENIED.

3. The Magistrate Judge's original Report and Recommendation will issue with Brad Gates as Respondent.

APPENDIX D

Robert A. Hungerschafer,

Plaintiffs,

v.

Brad Gates, et al.,

Respondents.

No. CV94-887-AWT(JR).

United States District Court,

Central District of California.

Final Report And Recommendation

This Final Report and Recommendation and the attached Report and recommendation are submitted to the Honorable A. Wallace Tashima, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and General Order 194 of the United States District Court for the Central District of California.

On October 17, 1995, the Clerk filed a Notice of Filing of Magistrate Judge's Report and Recommendation and Lodging of Proposed Judgment, which was served on the parties, together with copies of the Magistrate Judge's Report and Recommendation.

Objections were filed on October 26, 1995.

It is therefore the final recommendation of the Magistrate Judge that an Order be issued by the Court approving the adopting the Report and Recommendation and directing the Judgment be entered dismissing the petition.

DATED: October 31, 1995.

/s/Joseph Reichmann
United States Magistrate Judge

Robert A. Hungerschafer,

Plaintiffs,

v.

Brad Gates, et al.,

Respondents.

No. 94-887-AWT(JR).

United States District Court,

Central District of California.

Report And Recommendation On A Writ Of Habeas Corpus By A State Prisoner

This Final Report and Recommendation and the attached Report and recommendation are submitted to the Honorable A. Wallace Tashima, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

BACKGROUND

Petitioner Robert Anthony Hungerschafer ("Hungerschafer") was charged by complaint with violation of California Vehicle Code Section 23152(a) (driving while under the influence of an alcoholic beverage or drug) and 23152(b) (driving with a weight of .08 or more of alcohol in his blood), and California Penal Code §§ 135 (destruction of evidence) and 148.9(a) (falsely representing his identity to an officer). In addition, the complaint alleged that Hungerschafer was previously convicted of violating California Vehicle Code § 23152(a) on April 3, 1988 in Orange County, California, Municipal Court. [St. Ret., Exh. 2, p. 25, Exh. 4, p. 40.]

A blood test police took a few hours after Hungerschafer's March 24, 1991 arrest showed a blood alcohol content of .09. In preparing his defense, Hungerschafer says he met with and retained

Henry Greenberg, a private blood analyst, on May 1, 1991. On June 5, 1991, Hungerschafer says, he contacted his attorney, Fred Anderson, to learn how to obtain a private analysis of the blood sample taken the night of his arrest and then contracted Greenberg with the necessary authorizations so Greenberg could conduct the test. [Petition For Writ of Error Coram Nobis, ¶¶ 5-6, p. 2, State Court Record: Petitioner's Petition for Writ of Habeas Corpus As Filed In The Supreme Court Of The State Of California ("St. Pet."), filed Apr. 5, 1994, Exh. 7.] Greenberg ultimately prepared a declaration in which he opined that, at the time of Hungerschafer's DUI arrest, he had a blood alcohol content of "approximately" .04 to .06, and that, at the time his blood sample was taken, about 1-1/2 hours later, his blood alcohol content would have been .09. [Declaration In The Matter Of Robert Hungerschafer. ¶ 5, St. Pet., Exh. 4, p. 3.] Private analysis of the blood sample the police tested showed the alcohol weight was .08, not .09 as the police found.

On June 19, 1991, the day of his plea and sentencing, Hungerschafer says he met with attorney Anderson at the Orange County Municipal Court. After Anderson and the District Attorney negotiated, Hungerschafer discussed the matter with Anderson, Hungerschafer, using attorney Anderson's black pen, initialed and signed a "Defendant's Waiver Of Constitutional Rights For Guilty Plea To Section 23152 And Other Selected Vehicle Code Sections," which he says he says memorialized his plea agreement with the District Attorney. Hungerschafer says he asked attorney Anderson about expert Greenberg's report, but, Hungerschafer says, Anderson was unable to locate the documents and advised Hungerschafer that if there were anything of substance he would have remembered it. [St. Pet., Suppl. to questions, p. 2; Declaration of Fred Anderson, ¶ 2, St. Pet., Exh. 3.] Hungerschafer says he did not learn of the contents of the Greenberg report until August 22, 1991. [Coram Nobis Writ, ¶ 18, p. 5, St. Pet., Exh. 7.]

After attorney Anderson negotiated the plea agreement, Hungerschafer appeared in Orange County Municipal Court before the judge and entered a guilty plea to the Vehicle Code Section 23152(a), driving while under the influence of an alcoholic beverage or drug count. The judge dismissed the other counts in the information on motion of the District Attorney. [St. Ret., Exh. 2, p.

32.] The Court accepted Hungerschafer's guilty plea and placed Hungerschafer on three years' probation. As terms and conditions of probation, the Court imposed a fine and ordered Hungerschafer to serve 30 days in County Jail.[1] Anderson then "left the courtroom" and referred Hungerschafer to another attorney, Elliott Gayer, who was to deal with other, related matters. [Coram Nobis Writ, ¶¶ 7-9, p. 3, St. Pet., Exh. 7; Anderson Decl., ¶ 3, St. Pet., Exh. 3.]

The Court Clerk told Hungerschafer to wait for some paperwork. About 15 minutes later, the Court Clerk advised the trial judge that the "Tahl form" Hungerschafer had signed specified neither an S-38 program nor any other alcohol treatment program, and that it did not mention and restriction on Hungerschafer's driver's license. The trial judge instructed the bailiff to try to find attorney Anderson, but the bailiff could not locate him. [Coram Nobis Writ, ¶ 10, p. 3, St. Pet., Exh. 7.]

The trial judge then directed the Court Clerk to modify the "Tahl form" to include a one year restriction of Hungerschafer's driver's license and completion of an SB-38 alcohol program. "The bailiff then directed [Hungerschafer] to initial the box, and [Hungerschafer] did so." [St. Ret., Exh. 7.] These initialing were in blue ink. Though attorney Fred Anderson clearly was not present when Hungerschafer made these initialings, the record does not disclose whether attorney Gayer was still present.

Hungerschafer says neither the judge nor "anyone else" explained the SB 38 program to him or explained what his alcohol treatment alternatives were. He says he would never agreed to plead guilty had he known the purpose of the SB 38 program. [Coram Nobis Writ, ¶¶ 12-13, p. 4, St. Pet., Exh. 7.]

After filing various post-conviction petitions in state court, Hungerschafer filed his Petition For Writ Of Habeas Corpus in this court.

DISCUSSION

Since the State makes no contention that Hungerschafer failed to exhaust his state remedies or procedurally defaulted, the

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[1] Hungerschafer says the judge said "'sentenced per agreement.'" [Coram Nobis Writ, ¶ 8, p. 3, St. Pet., Exh. 7.]

Court proceeds to the merits. Granberry v. Greer, 481 U.S. 129, 134-35, 107 S.Ct. 1671, 1675 (1987) (failure to raise exhaustion defense); Francis v. Rison, 894 F.2d 353, 355 (9th Cir. 1990) ("[A] state waives procedural default by failing to raise it in federal court"; citing cases).

A. Ineffective Assistance Of Counsel On Plea [Ground 1]; Involuntariness Of Plea [Grounds 3 and 4]

Hungerschafer says trial attorney Fred Anderson rendered ineffective assistance of counsel because, prior to his entry of a guilty plea, Anderson did not advise Hungerschafer of the contents of an alcohol blood analysis by expert analyst Henry Greenberg. [Pet., p. 6.] He also says that, on August 22, 1991, he "discovered" the results of the private expert Greenberg's blood analysis. This "new evidence" demonstrates that the police analysis showing Hungerschafer had a .09 blood content was "false." Hungerschafer says he would never have pleaded guilty had he known about the "new evidence" and that the police had "false" evidence. [Pet., p. 7.] Since "these arguments differ in form, not in substance," the Magistrate Judge will discuss them together. Creech v. Arava, 947 F.2d 873, 876 (9th Cir. 1991), rev'd. in part on other grounds, ___ U.S. ___, 113 S.Ct. 1534 (1993).

"A guilty plea must represent 'a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" Creech, 947 F.2d at 876, quoting North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 164 (1970). See also Iaem v. Sunn, 800 F.2d 861, 866 (9th Cir. 1986) ("A guilty plea must be the voluntary expression of the defendant's own choice") (citing Brady v. United States, 397 U.S. 742, 748, 90 S.Ct. 1463, 1468-69 (1970)). When a defendant enters a plea of guilty upon the advice of counsel, the voluntariness of the plea depends on whether the defendant received the effective assistance of counsel. Hill v. Lockheart, 474 U.S. 52 56-57, 106 S.Ct. 366, 369 (1985).

"[T]he two-part Strickland v. Washington test applies to challenges of guilty pleas on ineffective assistance of counsel." Hill, 474 U.S. at 58, 106 S.Ct. at 370. To prevail under the Strickland test, Hungerschafer must show (1) deficient performance and (2)

prejudice. Strickland v. Washington, 466 U.S. 668, 693, 104 S.Ct. 2052, 2067, reh. denied, 467 U.S. 1267, 104 S.Ct. 3562 (1984). To show prejudice, Hungerschafer must show that his counsel's deficient representation has rendered his trial result unreliable or unfair. Lockheart v. Fretwell, ___ U.S. ___, ___, 113 S.Ct. 838, 842-43 (1993).

Here, Hungerschafer fails the prejudice prong of the Strickland test. "[I]n order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill, 474 U.S. at 59, 106 S.Ct. at 370. Furthermore, in assessing prejudice, the court must consider more than the defendant's self-serving assertions he would not have plead guilty. "[W]here the alleged error of counsel is a failure to advise the defendant of a particular affirmative defense to the crime charged, the resolution of the 'prejudice' inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial." Id., 106 S.Ct. at 370-71.

Assuming, without deciding, that counsel's conduct was somehow deficient,[2] Hungerschafer fails to show that Henry Greenberg's report would have resulted in a successful defense at trial. Conviction under Vehicle Code Section 23152(a), driving while under the influence of an alcoholic beverage or drug, does not require proof of a particular blood alcohol count. "Research on alcohol's effect on both motor skills and judgment reveal[s] that impairment occur[s] at alcohol concentrations as low as 0.05 percent . . .." Burg v. Municipal Court, 35 Cal.3d 257, 263, 198 Cal.Rptr. 145, 147, 673 P.2d 732, 734 (1983), appeal dismissed and cert. denied, 466 U.S. 967, 104 S.Ct. 2337 (1984). Thus, even had a jury

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[2] Under the first prong of the Strickland test, "[w]here, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of compitence demanded of attorneys in criminal cases.'" "Hill, 474 U.S. at 56, 106 S.Ct. at 369, quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449 (1970). "In reviewing alleged deficiences in representation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" Creech v. Arave, 947 F.2d at 876, quoting Strickland, 466 U.S. at 689, 104 S.Ct. at 2065.

chosen to believe expert Greengerg's conclusion that, at the time of arrest, Hungerschafer's blood alcohol count was only .04 to .06 percent, it still could have convicted him of driving under the influence.

Indeed, had a jury chosen not to believe expert Greenberg's conclusions, it could have convicted Hungerschafer of driving with a .08 blood alcohol content in violation of Cal. Vehicle Code § 23152(b). In this case, under the terms of the plea agreement, Hungerschafer was spared that possibility as well as the possibility of being convicted on the other two counts in the complaint. Nothing in the record suggests that a defense based on Henry Greenberg's report would have left his any better of that the plea agreement did.

B. Sentencing Issues

Hungerschafer also says Anderson was ineffective because he was not present when the trial judge allegedly "repudiated term 11" of the plea agreement by imposing conditions that Hungerschafer did not discuss with his attorney, the one year restriction on his driver's license and the requirement that Hungerschafer serve in an "SB-38 Program." [Pet., p. 6-7.]

Hungerschafer states in his petition for writ of habeas corpus to the California Supreme Court that he "has successfully completed all active and participating conditions of his sentence, and all sanctions have been satisfied. All that remains is the passive portion of his sentence consisting of approximately one year of informal probation. . .." [St. Pet., Suppl. To Questions 7, 10 & 15, p. 16]

Where a prisoner is merely attacking his sentence but not his conviction, the case becomes moot once the sentence has been served. Aaron v. Pepperas, 790 F.2d 1360, 1362 (9th Cir. 1986); see also Brady v. U.S. Parole Comm'n., 600 F.2d 234, 236 (9th Cir. 1979); (case challenging delay of parole is moot where prisoner is released on parole). Under this principle, the sentencing issues in this case, including Hungerschafer's challenge to his SB 38 condition, his driver's license suspension, and the failure to credit time served to his jail sentence are all moot.

Even were mootness not to preclude decision of this issue,

page three of the "Boykin-Tahl" form, which Hungerschafer initialed in black ink while Anderson was present, shows Hungerschafer was advised that the sentence for a second offense required a one-year restriction of his California driver's license and an alcohol program. (St.Ret.,Exh.1, p.22) On page 3 of the form, preprinted language explained that to "[a[ttend and complete [an] Alcohol/Treatment program as ordered" would "be recommended" as part of his sentence. [St. ret., Exh. 1, p. 23.] The form also said "Cal Trans Ok except for 1st weekend;" Hungerschafer was to serve 20 days for his current offense and 10 days for violation of probation in the 1988 drunk driving case. [St. Ret., Exh. 1, p.21.] Thus, it is clear that the trial judge did not repudiate any part of the plea agreement with Hungerschafer when he sentences Hungerschafer.

CONCLUSION

Accordingly, IT IS THEREFORE RECOMMENDED that the Court DENY Hungerschafer's petition for a writ of habeas corpus with prejudice.

DATED: this 17th day of October, 1995.

/s/Joseph Reichmann

United States Magistrate Judge

APPENDIX E

UNITED STATES CONSTITUTIONAL AMENDMENTS

U.S. CONST. Amend. VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously, ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel in his defense.

APPENDIX F

UNITED STATES STATUTES

FEDERAL Rules Of Criminal Procedure

11. Pleas

(k) Plea Agreement Procedure.

(5) Rejection of a Plea Agreement.

If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contentere the disposition on the case may be less favorable to the defendant than that contemplated by the plea agreement.

APPENDIX G

CALIFORNIA STATUTES

California Penal Code Section 851.8

(a) In any case where a person has been arrested and no accusatory pleading has been filed, the person arrested may petition the law enforcement agency having jurisdiction over the offense to destroy its records of the arrest. A copy of such petition shall be served on the district attorney of the county having jurisdiction over the offense, The law enforcement agency having jurisdiction over the offense, upon a determination that the person arrested is factually innocent, shall, with the concurrence of the district attorney, seal its arrest records, and the petition for relief under this section for three years from the date of the arrest and thereafter destroy its arrest records and the petition. The law enforcement agency having jurisdiction over the offense shall notify the Department of Justice, and any law enforcement agency which arrested the petitioner or participated in the arrest of the petitioner for an offense for which the petitioner has been found factually innocent under this subdivision, of the sealing of the arrest records and the reason therefor. The Department of Justice and any law enforcement agency so notified shall forthwith seal their records of the arrest and the notice of the sealing for three years from the date of the arrest, and thereafter destroy their records of the arrest and the notice of sealing. The law enforcement agency having jurisdiction over the offense and the Department of Justice shall request the destruction of any records of the arrest which they have given to any local, state, or federal agency or to any other person or entity. Each such agency, person, or entity within the State of California receiving such a request shall destroy its records of the arrest and such request, unless otherwise provided in this section.

(b) If, after receipt by both the law enforcement agency and the district attorney of a petition for relief under subdivision (a), the law enforcement agency and district attorney do not respond to the petition by accepting or denying such petition within 60 days after the running of the relevant statute of limitations has previously lapsed, then the petition shall be deemed denied. In any case where

the petition of an arrestee to the law enforcement agency to have an arrest record destroyed is denied, petition may be made to the municipal or justice court which would have had territorial jurisdiction over the matter. A copy of such petition shall be served on the district attorney of the county having jurisdiction over the offense at least 10 days prior to the hearing thereon. The district attorney may present evidence to the court at such hearing. Notwithstanding Section 1538.5 or 1539, any judicial determination of factual innocence made pursuant to this section made be heard and determined upon declarations, affidavits, police reports, and any other evidence submitted by the parties which is material, relevant, and reliable. A finding of factual innocence and an order for sealing and destruction of records pursuant to this section shall not be made unless the court finds that no reasonable cause exists to believe that the arrestee committed the offense for which the arrest was made. In any court hearing to determine factual innocence of a party, the initial burden of proof shall rest with the petitioner to show no reasonable cause exists to believe that the arrestee committed the offense for which the arrest was made. If the court that this showing of no reasonable cause has been made by the petitioner, then the burden of proof shall shift to the respondent to show that a reasonable cause exists to believe that the petitioner committed the offense for which the arrest was made. If the court finds the arrestee to be factually innocent of the charges for which the arrest was made, then the court shall order the law enforcement agency having jurisdiction over the offense, the Department of Justice, and any law enforcement agency which arrested the petitioner or participated in the arrest of the petitioner for an offense for which the petitioner has been found factually innocent under this section to seal their records of the arrest and the court order to seal and destroy such records, for three yraes from the date of the arrest and thereafter to destroy their records of the arrest and the court order to seal and destroy such records. The court shall also order the law enforcement agency having jurisdiction over the offense and the Department of Justice to request the destruction of any records of the arrest which they have given to any local, state, or federal agency, person or entity. Each state or local agency, person or entity within the State of California receiving such a request shall destroy its records of the arrest and the

request to destroy such records, unless otherwise provided in this section. The court shall give to the petitioner a copy of any court order concerning the destruction of the arrest records.

(c) In any case where a person has been arrested and an accusatory pleading has been filed, but where no conviction occurred, the defendant may, at any time after dismissal of the action, petition the court which dismissed the action for a finding that the defendant is factually innocent of the charges for which the arrest was made. A copy of such petition shall be served on the district attorney of the county in which the accusatory pleading was filed at least 10 days prior to the hearing on the petitioner's factual innocence. The district attorney may present evidence to the court at such hearing. Such hearing shall be conducted as provided in subdivision (b). If the court finds the petitioner to be factually innocent of the charges for which the arrest was made, then the court shall grant the relief as provided in subdivision (b).

(d)....

California Vehicle Code 23152(a)

It is unlawful for any person who is under the influence of an alcoholic beverage or drug, or under the combined influence of and alcoholic beverage and drug, to drive a vehicle.

APPENDIX H

PETITION TO SEAL AND DESTROY RECORDS PURSUANT TO PENAL CODE SECTION 851.8

PETITIONER:
I, ROBERT ANTHONY HUNGERSCHAFER, hereby request for a declaration of factual innocence per California Penal Code Section 851.8 and, for the arrest record(s) to be sealed for three years from the date of the arrest(s) and thereafter destroyed.

Information relating to the arrest(s):

Name: HUNGERSCHAFER, ROBERT, ANTHONY
Maiden or Alias Name:
Street Address: 855 N. LEMON STREET #3
City, State, Zip Code: ORANGE, CA 92667-6658
Phone No.: (714) 538-3816
Date of Birth: 07/02/57
Driver's License No.: U6130936
Social Security Number (voluntary--for ID only): 568-88-8636
Date of Arrest: 03/24/91
Arresting Agency: Santa Ana Police Department
Charge:

VEHICLE CODE 23152(b): DRIVING OVER 0.08
PENAL CODE 135: DESTRUCTION OF EVIDENCE
PENAL CODE 148.9(a): FALSE REPRESENTATION

Signature: /s/Robert Anthony Hungerschafer
Date: July 12, 1994

TO BE COMPLETED BY LAW ENFORCEMENT AGENCY OR COURT HAVING JURISDICTION OVER THE OFFENSE

Agency or Court Name: Central Municipal Court
Agency or Case No.: 91CS04043
Petitioner's Name: Robert Anthony Hungerschafer
Date of Birth: 7/02/57
CII No.:
FBI No.:

Arrested or Received: 3-24-91
Agency Number:
Charge:
23152(b) V.C.
135 P.C.
148.9(a) P.C.
Disposition: Dismissed
Found Factually Innocent: √
Signature of Agency or Court Officer: /s/Edward L. Laird
Officer's Title: Edward L. Laird, Municipal Court Judge
Date: 9/23/94
Copies to:
Department of Justice
District Attorney
Petitioner